

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARVIN SMITH SHAHEEN,

Plaintiff,

Hon. Hugh B. Scott

v.

04CV546A

Order

JOHN BEAVER, et al.,

Defendants.

Before the Court is defendants' renewed motion to compel or alternatively to dismiss for failure to prosecute (Docket No. 12, Oct. 4, 2005; see Docket No. 7, Aug. 29, 2005). This case was referred to the undersigned by Chief Judge Arcara (Docket No. 8, Aug. 31, 2005).

BACKGROUND

Defendant Jeffrey Skinner served interrogatories upon plaintiff (Docket No. 6, Aug. 17, 2005). But there has been no Rule 16 scheduling conference or Scheduling Order entered. This Court denied the motion, without prejudice, because discovery could not have begun until after the parties have conferred under Rule 26(f), see Fed. R. Civ. P. 26(d), and the Court had not then entered a Scheduling Order (Docket No. 9, Sept. 1, 2005; see Docket No. 12, Defs. Atty. Decl. ¶ 10). The Court then issued a Scheduling Order which set forth the discovery deadlines, as well as deadlines for preliminary motions to dismiss (Docket No. 10; see Docket No. 12, Defs. Atty. Decl. ¶ 11). These items were sent to plaintiff at his last known address, the correctional facility

he was then assigned to. These items later were returned as undeliverable because plaintiff was released and did not leave a forwarding address (Court's docket entry of Sept. 8, 2005).

Defendants in their renewed motion state that they reserved their discovery demands to plaintiff's last known address at the correctional facility (Docket No. 12, Defs. Atty. Decl. ¶ 12). They state that they are not aware plaintiff is once he was released from Department of Correctional Services' custody (id. ¶¶ 7, 8) and note that plaintiff failed to provide the Court or defense counsel with his new address (id. ¶ 13).

BRIEFING SCHEDULE AND IRBY NOTICE

Responses to this motion shall be filed on or before **October 21, 2005**; a reply, if any, shall be filed on or before **October 28, 2005**, and the motion then will be deemed submitted without oral argument unless otherwise determined by the Court upon review of the papers.

If plaintiff fails to respond to this motion, appear at this argument, or contact the Court to seek its rescheduling, this Court may recommend that the action be dismissed for failure to prosecute. See Irby v. New York City Transit Auth., 262 F.3d 412 (2d Cir. 2001); attached Irby notice. Plaintiff is also reminded that under this Court's Local Civil Rule 5.2(d) a party appearing pro se must furnish the Court with a current address where papers may be served and the Court must have a current address at all times. That rule requires the pro se party to inform the Court, in writing, of all changes of address, with failure to do so possibly resulting in dismissal of their case. W.D.N.Y. Local Civ. R. 5.2(d). Papers sent to the address in the Court records is presumed to have been received by the pro se party. Id.

This Order will be sent to plaintiff's last known address, at Cossackie Correctional Facility. If either defendant learns or plaintiff reveals his present address, a copy of this Order will be sent to that address.

So Ordered.

s/HBS
Hon. Hugh B. Scott
United States Magistrate Judge

Dated: Buffalo, New York
October 5, 2005

Attachment: Irby Notice